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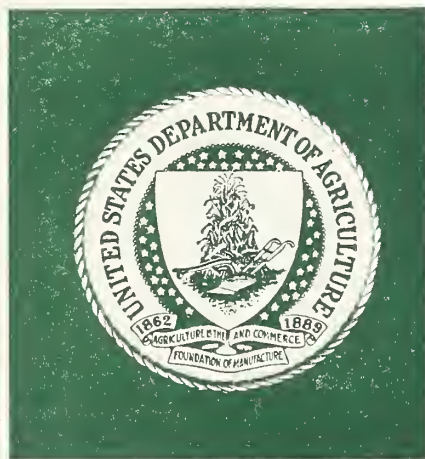
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Brief prepared by

U. S. DEPARTMENT, OF FORESTRY

covering their policy on

CONSERVATION //

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This is a brief prepared by the Department of Forestry
covering their policy on conservation. //

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April 20, 1908.

MEMORANDUM

Policy of the Forest Service as to Permits for Power Plants
in National Forests

A. A Great Power Monopoly is Threatened

The imminence and the gravity of the danger of power monopoly is indicated by the President in his Message of February 26 (Exhibit 1), in the following words:

While we delay * * * * the material wealth and natural resources of the country related to waterways are being steadily absorbed by great monopolies.

Among these monopolies, as the report of the Commission points out, there is no other which threatens, or has ever threatened, such intolerable interference with the daily life of the people as the consolidation of companies controlling water power. I call your special attention to the attempt of the power corporations, through bills introduced at the present session, to escape from the possibility of Government regulation in the interests of the people. These bills are intended to enable the corporations to take possession in perpetuity of National Forest lands for the purposes of their business, where and as they please, wholly without compensation to the public. Yet the effect of granting such privileges, taken together with rights already acquired under State laws, would be to give away properties of enormous value. Through lack of foresight we have formed the habit of granting without compensation extremely valuable rights amounting to monopolies on navigable streams and on the public domain. The repurchase at great expense of water rights thus carelessly given away without return has already begun in the East, and before long will be necessary in the West also. No

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rights involving water power should be granted to any corporation in perpetuity, but only for a length of time sufficient to allow them to conduct their business profitably. A reasonable charge should of course be made for valuable rights and privileges which they obtain from the National Government. The values for which this charge is made will ultimately, through the natural growth and orderly development of our population and industries reach enormous amounts. A fair share of the increase should be safeguarded for the benefit of the people, from whose labor it springs. The proceeds thus secured, after the cost of administration and improvement has been met, should naturally be devoted to the development of our inland waterways.

The Inland Waterways Commission, in its preliminary report transmitted by the President's Message above cited (Exhibit 1), uses the following language:

In the light of recent progress in electrical application, it is clear that over wide areas the application of water power offers an unequalled opportunity for monopolistic control of industries. Wherever water is now or will hereafter become the chief source of power, the monopolization of electricity produced from running streams involves monopoly of power for the transportation of freight and passengers, for manufacturing, and for supplying light, heat, and other domestic, agricultural, and municipal necessities, to such an extent that unless regulated it will entail monopolistic control of the daily life of our people in an unprecedented degree. There is here presented an urgent need for prompt and vigorous action by State and Federal Governments.

The President, in his Message of April 13 (Record, page 4854), in discussing the policy to be pursued with regard to dams in navigable waters, laid down the following principles, which apply to power plants in National Forests as well as to power development on navigable rivers:

* * * The authority to make, modify, or withhold grants manifestly implies both the power of inquiring

into the grounds on which the grants are asked and the duty of administering the grants in the public interest.

We are now at the beginning of great development in water power. Its use through electrical transmission is entering more and more largely into every element of the daily life of the people. Already the evils of monopoly are becoming manifest; already the experience of the past shows the necessity of caution in making unrestricted grants of this great power.

The present policy pursued in making these grants is unwise in giving away the property of the people in the flowing waters to individuals or organizations practically unknown, and granting in perpetuity these valuable privileges in advance of the formulation of definite plans as to their use. In some cases the grantees apparently have little or no financial or other ability to utilize the gift, and have sought it merely because it could be had for the asking.

In place of the present haphazard policy of permanently alienating valuable public property we should substitute a definite policy along the following lines:

1. There should be a limited or carefully guarded grant in the nature of an option or opportunity afforded within reasonable time for development of plans and for execution of the project.

2. Such a grant of concession should be accompanied in the act making the grant by a provision expressly making it the duty of the designated official to annul the grant if the work is not begun or plans are not carried out in accordance with the authority granted.

3. It should also be the duty of some designated official to see to it that in approving the plans the maximum development of the navigation and power is assured, or at least that in making the plans these may not be so developed as ultimately to interfere with the better utilization of the water or complete development of the power.

4. There should be a license fee or charge, which, though small or nominal at the outset, can in the future be adjusted so as to secure a control in the interest of the public.

5. Provision should be made for the termination of the grant or privilege at a definite time, leaving to future generations the power or authority to renew or extend the concession in accordance with the conditions which may prevail at that time.

In a report on applications and rights of way granted over public land in northern California for power purposes, by

Mr. S. G. Bennett, Engineer, U. S. Reclamation Service, dated November 8, 1905, (Exhibit 2), the following language is used:

Of the twenty-three rights of way granted for ditches, reservoirs, pole lines, and other power purposes in the Sacramento, Stockton, and Visalia Land Districts, six are controlled by the Pacific Light and Power Company, or affiliated companies; four by the Edison Electric Company; five by the Mt. Whitney Power Company; i. e., more than 65 per cent of the applications in these three districts are controlled by three companies. Each of the remaining applications, as far as known, is held singly by corporations or individuals. One of these rights of way is controlled by the California Gas and Electric Corporation. This corporation has been attempting to control all possible water power locations in the Sierra Nevada, which were situated within commercial distance of San Francisco. Their policy seems to have been changed somewhat recently. They are, however, still endeavoring to maintain a monopoly of the power business in central California. Nearly all of the plants of this company are located on land that has passed out of Government ownership. The following quotation is from a letter written to me by Mr. L. E. Hancock, an electrical engineer formerly employed by the Bay Counties Power Company, one of the companies controlled by the California Gas and Electric Corporation, and illustrates the change of policy mentioned above:

"One of the leading men of the California Gas and Electric Corporation told me a few days ago that they had found it impossible to hold and control all the possible water power locations of the Sierras and they are concentrating on methods to control the market.....In the counties where I traveled while working for the Bay Counties Power Company there are a great many locations that that company held for a time and abandoned later on because they had the market."

These locations were held principally by filing on the water under State laws and making a pretense of construction. The law governing the acquisition of water rights requires that within 60 days after the notice is filed the claimant must commence the construction of the works.....and must prosecute the work diligently and uninterruptedly to completion.....A tabulation and study of the rights of way applied for and granted will not give an idea of the extent to which the power possibilities have passed from the control of the people, because of the fact that speculators seem able to hold

the water rights under the State law for years without making any material improvement and often rights of way are not requested from the Government.

* * * * *

It is rumored that a great consolidation of electric companies is about to take place. (See clipping from San Francisco "Chronicle" on page 29.) I believe that the consolidation is more extensive than these clippings indicate, and that it may include the California Gas and Electric Corporation, the San Francisco Gas and Electric Company, the Truckee River General Electric Company, the Western Power Company, and possibly the American River Power Company. It is difficult to get information on this subject. The above conclusion has been reached from circumstantial evidence only.

Mr. Bennett's information was substantially correct.

A prospectus issued by N. W. Halsey and Company, of 49 Wall Street, New York (Exhibit 3), accompanied by a printed syndicate agreement (Exhibit 4), dated October 1, 1907, advertising a proposed issue of 30-year 5 per cent gold bonds of the California Gas and Electric Corporation to the amount of \$45,000,000 affords convincing proof of the monopolization of valuable water powers in California and the tendency to consolidate them under a single power trust. In this prospectus it appears that this corporation controls thirteen subsidiary corporations operating in many towns; that its capitalization is slightly over \$30,000,000 of bonds and \$10,000,000 of outstanding stock; that its surplus for the fiscal year of 1907, after paying all expenses of operation, maintenance, taxes, interest, and sinking fund, was \$1,325,103, being more than eight times the charge for sinking fund for that year and an increase of 85 per cent of the surplus over the preceding year. In view of the

statement so frequently and so emphatically made that capital for corporations of this character can not be obtained from bankers, unless the corporation has a perpetual easement in the public lands, it is interesting to note that these bonds mature in thirty years and that the sinking fund to be provided will retire \$17,500,000 of them before maturity, the bonds being callable at \$110 and interest after 1912. For the last ten of the thirty years \$900,000 a year is to be devoted to this purpose. If this is kept up for twenty years after maturity, it will amount to \$18,000,000 more, which would retire more than \$35,000,000 out of the total \$45,000,000 issued, and if the annual payment of the sinking fund were increased for those twenty years, as it ought to be, in view of the steadily decreasing interest charge, it would be possible to retire the whole issue in fifty years without hardship to the company.

This corporation is controlled by the Pacific Gas and Electric Company, which owns nearly all the capital stock. This holding company has a capitalization of over \$43,000,000, \$20,000,000 of which is authorized common stock, but it is proposed to leave a large proportion of the common stock as an asset in the company's treasury, though the earnings for the year ending June 30, 1907, after deducting dividends and the preferred stock, are sufficient to pay more than 5 per cent on the entire \$20,000,000 of authorized common stock. For the year ending June 30, 1908, the balance of dividends on the authorized common stock is estimated to be sufficient to pay 7-8/10 per cent.

This holding company also controls the San Francisco Gas and Electric Company. The following quotations from this prospectus illustrate the extent to which the monopoly of power in California has already gone:

a. The Pacific Gas and Electric Company:

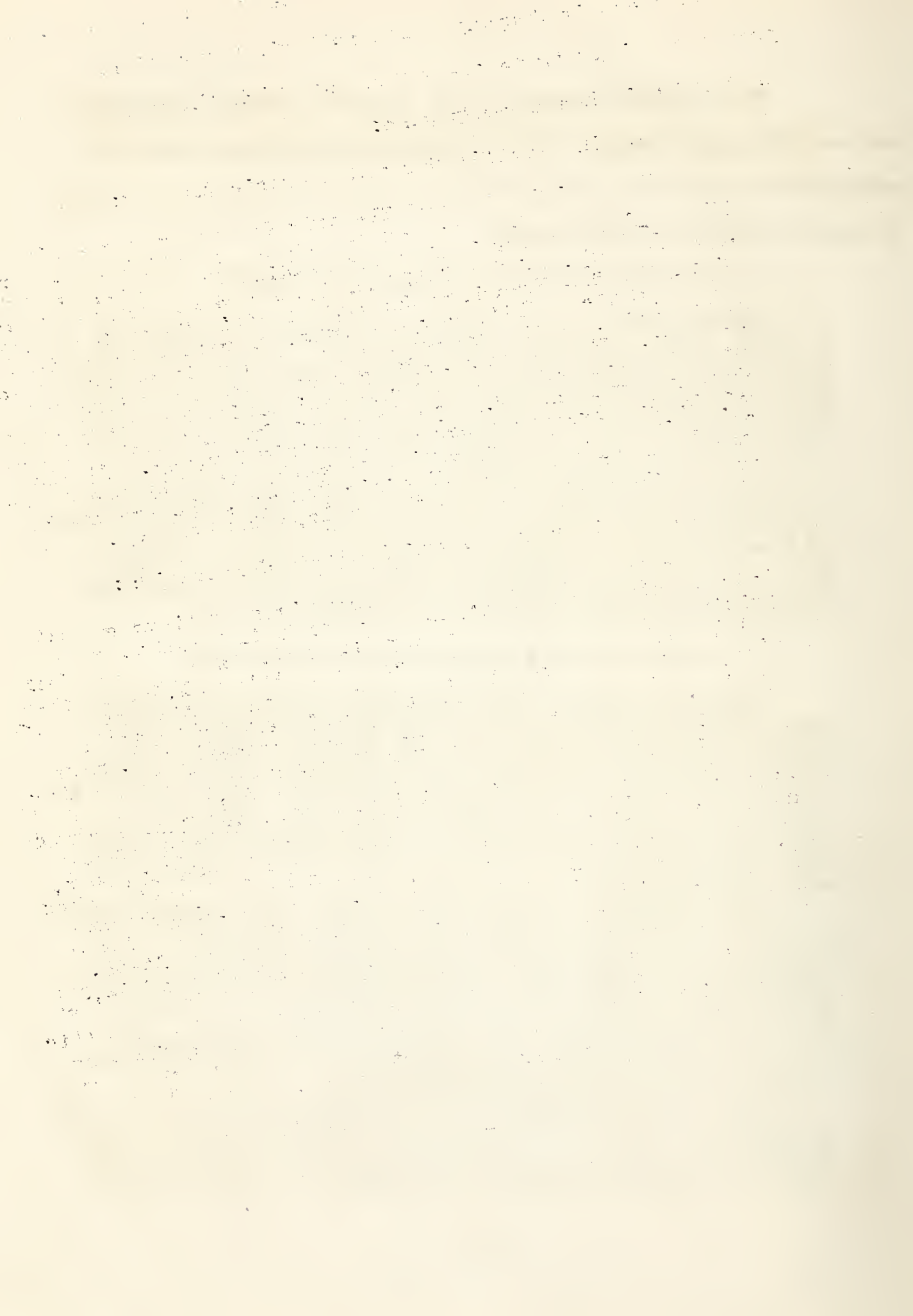
The Pacific Gas and Electric Company was organized in 1905, under the laws of the State of California, for the purpose of purchasing and holding the stock, or stock and property, of the California Gas and Electric Corporation, the San Francisco Gas and Electric Company and such other public utility corporations, operating in central California, as the management might deem it advisable to acquire. It now owns 99.79 per cent of the entire outstanding capital stock of the California Gas and Electric Corporation, and 97.17 per cent of the entire capital stock of the San Francisco Gas and Electric Company. It also owns, in fee, the properties formerly owned by the California Central Gas and Electric Company, the Fresno Gas and Electric Company and the Vallejo Gas Company.

b. California Gas and Electric Corporation:

Territory Served: The Company's operations extend into twenty-three counties of central California, comprising an area approximately 225 miles in one direction and 125 miles in the other, and containing 31,489 square miles, or over four times the area of the entire State of New Jersey. It is estimated by competent authorities that this territory contains, at the present time, more than 1,350,000 people, or over 60 per cent of the population of California.

One hundred and nine cities, towns, and lesser communities are served. In each of these one or more of the Company's products--gas, electric light, electric power, and water--are supplied. Among the more important places are Oakland, Sacramento, San Jose, Berkeley, Stockton, Fresno, Alameda, and, indirectly, San Francisco. These comprise eight of the ten largest cities of the State. The Street Railway System of Sacramento, a city of 42,000 people, is also owned and operated.

The close alliance of the California Gas and Electric Corporation with the San Francisco Gas and Electric Company has also placed at the command of the former the entire San Francisco market as an outlet for such surplus



hydro-electric power as it may deem it expedient to develop from its large reserve water power from time to time. The advantages of this situation to both companies are obvious.

Hydraulic Development and Electrical Business:

The numerous streams rising in the Sierra Nevada Mountains, and falling, within a comparatively short distance, to the low levels of the central valley of California, afford unsurpassed opportunities for hydro-electrical power development. The power rights on many of these streams, including the most valuable, have been acquired by the California Corporation.

Electric Light and Power Contracts and New Installations:

By the control, on the one hand, of the best and most economical water powers, and, on the other hand, of the markets for power through ownership of the distributing companies in the principal cities and long term contracts with large users of power, the business of the company is beyond the reach of serious competition.

c. San Francisco Gas and Electric Company:

The San Francisco Gas and Electric Company supplies the city of San Francisco with gas and electricity without any competition worthy of serious consideration.

In view of the statement often made that the charges imposed by the Forest Service are confiscatory, the following statement from page 14 of the prospectus is interesting:

"The rates to ordinary consumers--those contributing the bulk of the revenue--are as follows in three of the principal cities served:"

Cities	Gas per thousand cubic feet	Electric Lighting per K. W. hour	Electric Power per K. W. hour
San Francisco	\$.85	\$.04 to .09	\$.030 & upwards
Oakland	.90 to \$1	.04 to .095	.030 & upwards
Sacramento	1.00	.04 to .095	.035 & upwards

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As the earnings, given herein, were made with these low average rates, it seems safe to conclude

1. That such earnings are upon a firm basis and one that is not at all likely to be disturbed.
2. That competition of a serious character need not be apprehended.

b. General Conditions:

The price of the best domestic coal, delivered in San Francisco, exceeds \$10 per ton. Steam coals range from \$6.50 per ton upward. The price of wood is proportionately high. This applies with practically the same force to the whole of central California. The field open to gas for fuel and electricity for lighting and power is, therefore, apparently limitless. As the companies utilize water power for the production of practically three-fourths of their electrical current and manufacture the greater part of their gas from crude oil they are virtually free from the disadvantages of high fuel costs.

California is among the wealthiest States of the Union ranking fifth in banking resources and exceeding Massachusetts in this respect. It also occupies fifth rank as to individual banking deposits, exceeding Ohio in the amount of such deposits. Its agricultural area and resources are said to be capable of supporting 20,000,000 people. The output of minerals in 1906 had a value of \$54,000,000. The value of its manufactured products increased from \$302,874,000 in 1900 to \$367,218,000 in 1905, a growth of 21 per cent in five years. Future growth should be even more rapid and these various corporations are in a position to share in it to as great an extent as any industry in the State.

The business of the company is so diversified and covers such a varied territory and the company is so well equipped for economical production on a large scale and has such a strong grip on the situation through the ownership of distributing systems in the chief cities and towns that it would be difficult for any competition to do it serious injury.

The public is alive to the magnitude of the danger that threatens them. An editorial in the Washington Post of March 1, 1908 (Exhibit 5), used the following language:

"Efforts are now being made to induce the Interior Department to sanction measures giving water and electric power companies rights of way through the National Forests, on the mere filing of maps showing the manner in which such companies propose to occupy the public lands. The argument is used that these enterprises are necessary agents in developing the West, and deserving of governmental assistance. Bills are pending in Congress which, if enacted as they are drawn, would give private corporations permanent and immensely valuable rights, without any return whatever to the public. It goes without saying that no member of President Roosevelt's Cabinet will sanction such measures, and there is no probability that Congress can be induced to enact such legislation. It certainly will not do so if the true condition of affairs is made known."

"Whether the water power on the public domain and the rights of way for electric power lines are held in separate hands, as at present, or whether these enterprises are merged into a trust, as now seems probable, the public must be protected."

The foregoing quotations furnish sufficient evidence that the evils of a monopoly of this great natural resource are sufficiently threatening to justify and demand the protection of the public, so far as that can be assured by the power of the Federal Government.

B. What is the Policy of the Forest Service as to
Water Power?

It is simply this: (1) To charge a reasonable rental for National Forest land occupied and used by the power companies; (2) To prevent monopoly by forcing the companies to make prompt use of their privileges or forfeit their permits and issuing permits as contracts which are thereby made non-transferable by Sec. 3737 of the Revised Statutes, (Use Book p. 180); and (3) by obeying the law (Act February 15, 1901, 31 Stat. 790 Use Book, p. 185-6), which expressly forbids the grant of permanent easements for this purpose.

1. The "Conservation Charge"

The National Forests include the great mountain chains of the West. The rain and melting snow of these ranges feed the mountain streams. The forest cover on the steep slopes acts like a mighty sponge, absorbing the excess of rainfall in the wet season and giving it out to the thirsty lands in the dry season. It is for the express purpose of thus "securing favorable conditions of water flows" (Acts June 4, 1897, 30 Stat. 34, Use Book, p. 170) that Congress has authorized the creations of National Forests and expends money for their administration and maintenance. Where the forest cover is destroyed by reckless lumbering and the fires which inevitably follow, the rains immediately run off the steep slopes as from

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the roof of a house, producing destructive floods in the valleys and leaving no store of water for the dry season. Therefore, when a power company puts its plant on National Forest land it gets from the Government two things which it ought to pay for, viz: (a) The use of land of great value for power purposes, for the steep mountain sides give the fall which is essential to a power plant; (b) The guarantee of a steady flow of water as an incident to the land occupied by the plant. This steady flow is also essential to a power plant. It is as if the riparian proprietor of a valuable power site at a fall on a river also maintained at great expense a large storage reservoir at the headwaters of the river. If asked to lease the power site the landowner would, in fixing the rental, consider the fall incident to his land and the increased minimum flow incident to his storage reservoir. This is precisely what the Forest Service does. It issues a permit, as it is authorized by law to do (The legal references are given below at page 17) for the occupancy of National Forest land by dams, reservoirs, conduits, power houses, transmission lines, etc.; for an annual payment based upon the amount of power actually developed. The power developed is conditioned by the fall and the minimum flow, both of which are furnished and assured by the Forest Service. This annual land rental has been called a "conservation charge," because one of the advantages furnished by the Government is the conservation of the water flow by maintenance of forest cover. The rate of charge is

The first thing I noticed when I stepped out of the car was the cold. It was a sharp, biting cold that seemed to penetrate my coat. I shivered as I walked towards the building, my hands tucked into my pockets. The air was thick with the scent of old stone and the distant hum of city traffic. I had heard that the place was haunted, but I didn't believe it until now. The building was a grand, multi-story structure with many windows, some of which were boarded up. A sign above the entrance read "The Old House". I took a deep breath and pushed open the heavy door. Inside, the air was even colder. The floor was made of polished wood, and the walls were covered in dark, patterned wallpaper. A large chandelier hung from the ceiling, casting a soft glow. I walked down a long hallway, my footsteps echoing. At the end of the hallway was a large room with a fireplace. The fire was burning brightly, and the room was warm. I sat on the edge of the fireplace, looking at the flames. I felt a strange sense of peace. I had found a place where I could finally relax. I closed my eyes and listened to the crackling of the fire. I was alone, but I wasn't scared. I was safe. I was home.

small in comparison with the advantages furnished by the Government. This is explained in detail below at page 28.

It is not true that the Forest Service has ever imposed or contemplated the imposing of a charge upon power plants situated outside National Forests. The charge is simply rent paid for the use and occupation of National Forest land. For example, if the White Mountains in New Hampshire are purchased and made a National Forest by Congress anybody who thereafter got a permit to use for a power site some of the land so purchased would pay the "conservation charge" as rental. The mills at Manchester, Lowell, Lawrence, and other points on the Merrimac River below the National Forest would not pay any "conservation charge," simply because they would not be renting National Forest land.

2. Prevention of Monopoly

The practice of the Forest Service aims to prevent monopoly of undeveloped power resources such as is described in the report of Engineer Bennett of the Reclamation Service, above cited, by imposing the following conditions as a part of every permit, with the penalty of forfeiture for their breach.

a. Construction work must begin within a specified time, which is usually very brief, say three months, and is fixed in accordance with the physical conditions such as accessibility, freedom from snow, etc.

b. Construction work must also be completed within a specified time, which is fixed with reference to physical conditions only, such as engineering difficulties, etc., with a proviso that the Forester may extend the time if necessary. Such extension is usually granted only because of unforeseen physical obstacles to construction, such as floods, engineering difficulties which could not have been anticipated, etc. The time will not be extended because the permittee has not succeeded in finding financial backing for his enterprise in times when business conditions are normal, but during the recent financial stringency extensions were granted, since it would be unjust to hold the permittees responsible for those financial obstacles which they could not have foreseen or guarded against.

c. Every permittee must pay from the date of his permit one dollar an acre for all National Forest land to be occupied by reservoirs, power houses, and the like, and five dollars a mile for all such land to be occupied by conduits, transmission lines, etc. This charge is small in amount, but so far as it goes operates as a stimulus to development and a check upon any tendency to hold a power site undeveloped. No complaint has been made about this trifling charge, which is in addition to the so-called conservation charge to be explained in detail below, at page 28.

d. Every permit fixes the conservation charge for forty years. Congress has prescribed that all permits must

be revocable as is explained below at page 16. But permits as now issued fix the conditions for that time just as far as the Department is authorized to do so. At the end of forty years such new conditions as experience then shows to be necessary to prevent monopoly and to protect the public may justly be imposed by the Department.

e. Since all permits are in the form of contracts, their transfer to any other party causes the annulment of the permit so far as the United States is concerned. This is by virtue of Section 3737 of the Revised Statutes (Use Book p. 130). Every permittee who desires to transfer his permit to a corporation or holding company must surrender the permit, and the transferee must take a new one. Since it is within the power of the Department to refuse a permit to the transferee, any consolidation which threatens the public interest can be prohibited, or such new conditions may be imposed in the new permit as may be necessary to protect the public.

3. Permanent Easements Prohibited

The public is further protected against monopoly by the provisions of the Act of February 15, 1901, (31 Stat. 790, Use Book, p. 185), the concluding words of which read as follows:

And provided further, That any permission given by the Secretary of the Interior under the provisions of this act may be revoked by him or his successor in his discretion, and shall not be held to confer any right, or easement, or interest in, to, or over any public land, reservation, or park.

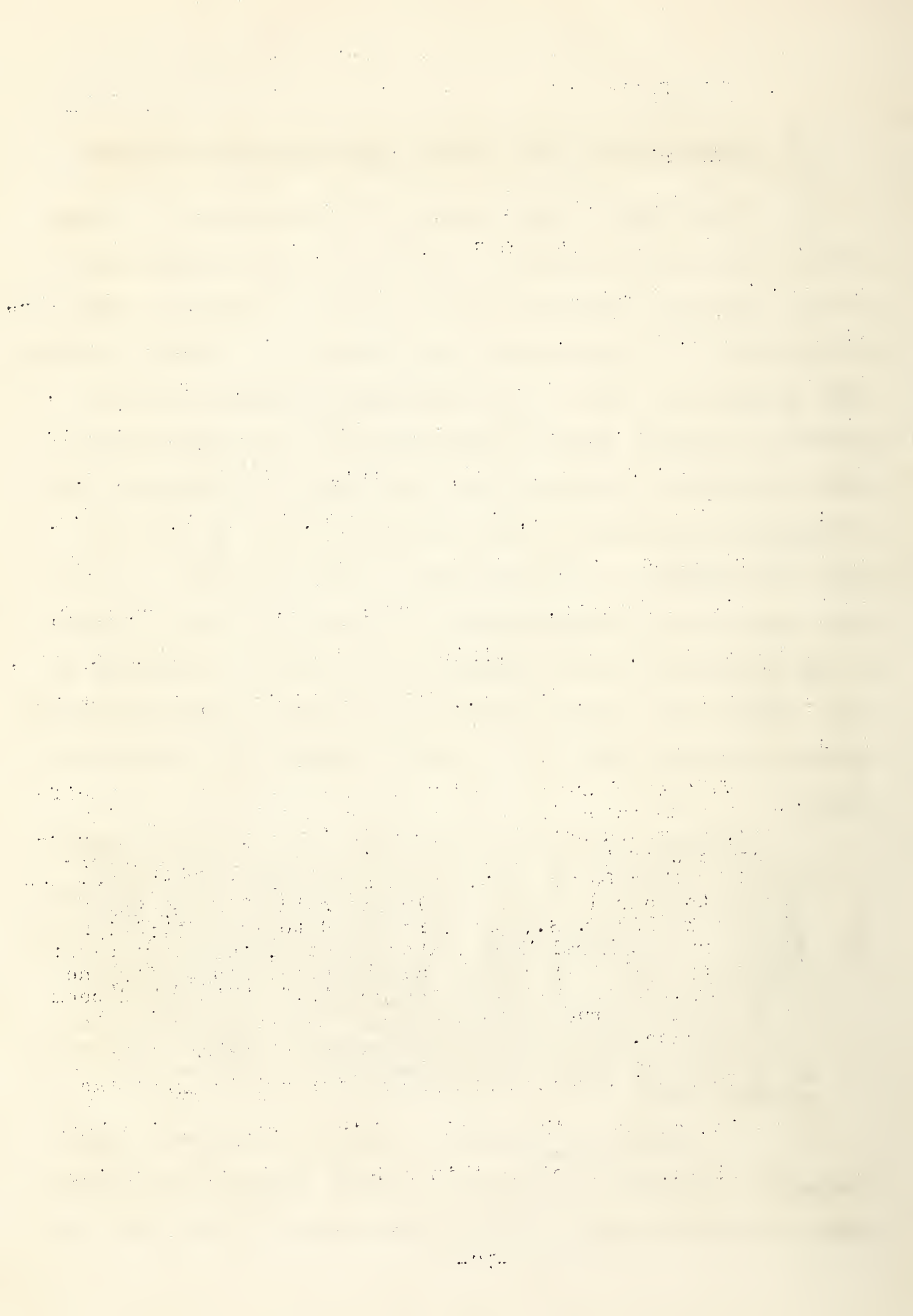
In thus refusing to grant perpetual rights for power purposes Congress has shown commendable foresight. The abuses of perpetual franchises for public utilities are too well known to need restatement at this time.. It is absolutely essential that all grants of valuable exclusive privileges by the Government should be limited in time so that each bargain may be made anew at the expiration of the term as the conditions then existing may demand for the protection of the public. It is probable, however, that this statute, in making all contracts revocable at the will of the Secretary, for the time being, has gone too far. It would be entirely proper to issue irrevocable permits for terms not exceeding a limit to be fixed by statute. This matter is more fully explained below, at page 36.

C. This Policy of the Forest Service is Clearly Legal

The right of the Secretary of Agriculture to charge for any use of National Forest land or resources rests upon the Act of June 4, 1897 (30 Stat., 34-36, Use Book, p. 170) and section 5 of the Transfer Act of February 1, 1905 (33 Stat., 628, Use Book, p. 174). This right was affirmed by the decision of Attorney General Moody, dated May 31, 1905 (25 Op., 470) and has been recognized and confirmed by subsequent acts of Congress (Act June 30, 1906, 34 Stat., 684, Use Book, p. 174; Act of March 4, 1907, 34 Stat., 1270, Use Book, p. 177). That the right to charge extends to permits for power plants on the National Forests, granted under the Act of February 5, 1901, above cited, is the opinion of Attorney General Bonaparte, dated October 5, 1907, (26 Op., 421) (Exhibit 9), in which he says:

Whether charges based upon the three grounds specifically enumerated in your letter requesting an opinion would, or would not, be reasonable is not, under the circumstances of this case, a question proper to be determined by this Department, but a matter left by the law entirely to your discretion. In *Riverside Oil Company v. Hitchcock* (190 U. S., 325), referred to in the opinion of Attorney General Moody, above quoted, the Court says: "The responsibility as well as the power rests with the Secretary, uncontrolled by the courts." This would seem to be no less true as to the question presented in the present case.

In seeking some legal ground for criticism of the "conservation charge," the critics of the Forest Service have gone far afield, among other things denying the right of the



United States to reserve public lands in a state and lease them so as to derive a revenue. Unfortunately for this contention, the Supreme Court in the case of U. S. v. Gratiot (14 Pet. 538) has definitely decided that the Government has power to reserve and lease its lands; that such reservation and leasing is a disposal within the meaning of Article 4, Section 3, Clause 2 of the Constitution providing that the Congress shall have power to dispose of and make all needful rules and regulations for the territory and other property belonging to the United States, and that such permanent reservation and leasing is no infringement of state rights. At page 536-537, the Court says:

The term territory, as here used, is merely descriptive of one kind of property; and is equivalent to the word lands. And congress has the same power over it as over any other property belonging to the United States; and this power is vested in congress without limitation; and has been considered the foundation upon which the territorial governments rest. In the case of McCulloch v. State of Maryland, 4 Wheat. 422, the chief justice, in giving the opinion of the court, speaking of this article, and the powers of congress growing out of it, applies it to territorial governments; and says, all admit their constitutionality. And again, in the case of the American Insurance Company v. Canter, 1 Pet. 542, in speaking of the cession of Florida, under the treaty with Spain; he says, that Florida, until she shall become a state, continues to be a territory of the United States government, by that clause in the constitution which empowers congress to make all needful rules and regulations respecting the territory or other property of the United States. If such are the powers of congress over the lands belonging to the United States, the words "dispose of," can not receive the construction, contended for at the bar; that they vest in congress the power only to sell, and not to lease such lands. The disposal must be left to the discretion of congress. And there can be no apprehension of any encroachments upon state rights, by the creation of a numerous tenantry within their borders; as has been so strenuously urged in the argument.

That Court has also decided in the "Hot Springs Cases" (92 U. S. 698) that the public lands and springs thereon at Hot Springs, in Arkansas, are the absolute property of the Government. It has also been decided that the acts of Congress providing for the lease of these lands are valid (Van Lear v. Eisele, 126 Fed. Rep. 828).

The opponents of the Forest Service also contend that the United States, when a public use corporation wishes to cross forest reserve land, is in no better position than a private owner; but the Government's position is at least different in that the right of eminent domain can not be exercised against it. Surely Congress left Government land in this condition, dissimilar from that of the private owner, with full intent. The vast extent of the forest reserves places them physically in a different situation from most private land. The private owner of an estate as large as the Sierra Forest Reserve would be practically, even under existing laws, in a position to get from the use of any natural advantages upon his estate that which they are actually worth, instead of merely the surface value for general purposes of any land occupied; and if he were in the same position as the United States concerning eminent domain, no doubt would arise about his power and right to make from any and all advantages and resources on his land that which they are worth. The difference between the probable action of such a private owner and the

proposed course of the Secretary of Agriculture is that the Secretary does not intend to charge the ultimate rate possible to be obtained, and it is only right to assume that no successor will make the charge unconscionable. The whole theory of Government control in this particular as in all others must presume that administrative officers will use their power reasonably and justly, and for the best interests of all concerned. It is plain, then, that the owner of such a fall is furnishing a definite value when he permits it to be used, and the Secretary of Agriculture, when fixing the charge, has the right to consider the fall as an opportunity or resource furnished by the Government.

This contention of the protestants loses its force when the settled principles of the law governing the compensation due to a person whose property is taken by condemnation in the exercise of the right of eminent domain are considered. The general rule is thus stated:

"The terms "compensation," "just compensation," "adequate compensation," and the like, found in constitutions, and statutes in reference to the subject of eminent domain, mean a full indemnity for the loss sustained by the owner of property when the property is taken or injured for public use." 10 Am. & Eng. Encycl. of Law 2d ed. 1132 and cases there cited.

And it is unquestionable that the special value of the land for the particular purpose contemplated in the taking is an element in the compensation that must be paid.

"The special availability of land by reason of its situation to the particular uses to which it is put, and to other uses to which it is plainly adapted, is to be considered in determining the valuation given to it. *
* * * Any use for which the land is adapted may be considered, even though the land is not used for that purpose.
* * * Thus the fact may be shown that the lands possess peculiar advantages as a site for a ferry landing, or for a dairy stock farm and for grazing purposes, or for warehouse purposes, or for church purposes, or for a bridge site, or for market gardening, or for railroad purposes, or for residence purposes." Id. 1161-1162, and cases there cited.

Among the numerous authorities for this doctrine

(many of which are cited in 10 Am. & Eng. Ency. 1161-1162)

it is necessary to refer at length to but one, Boom Co. v.

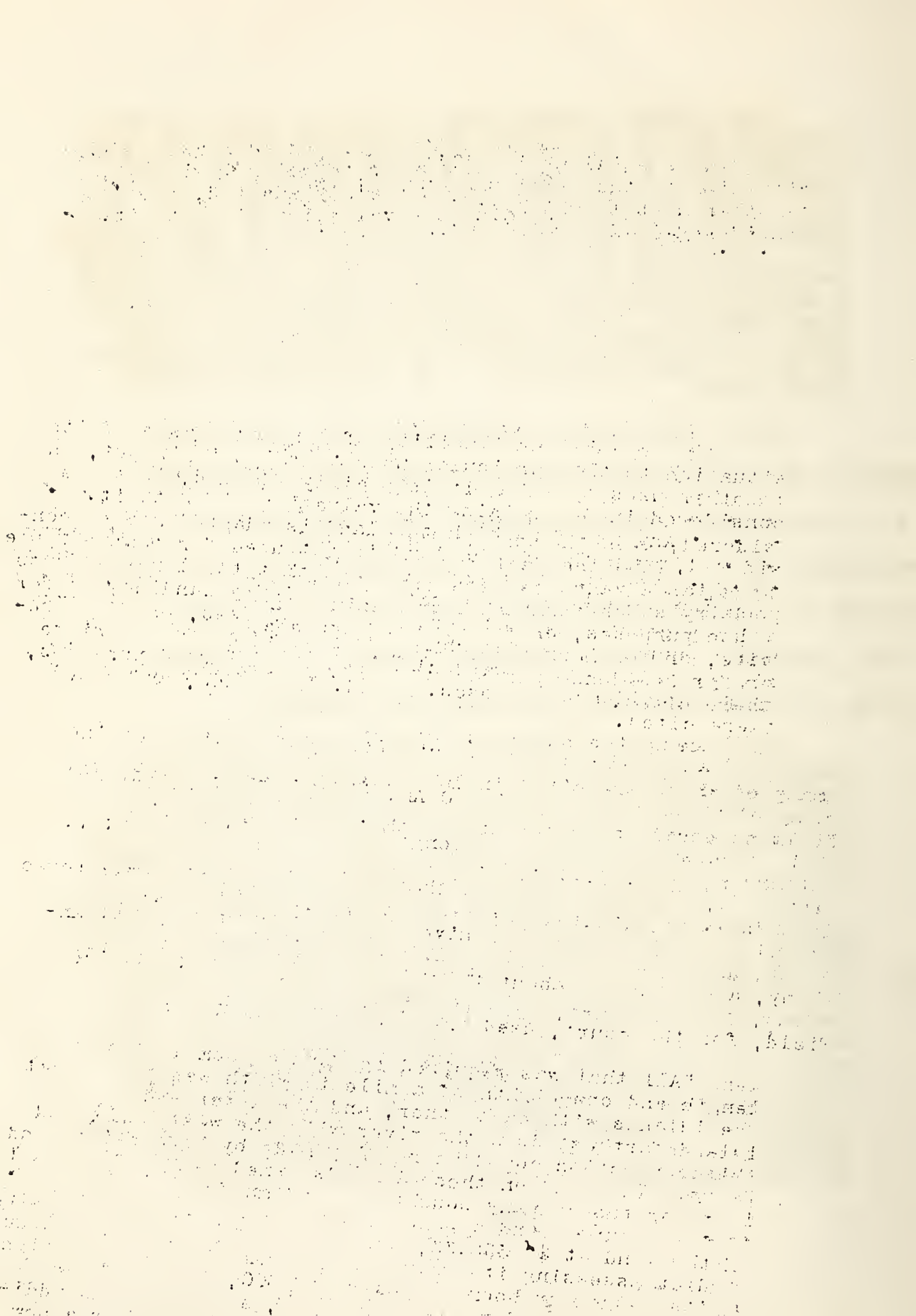
Patterson, 98 U. S. 403. In that case the property was three

islands in the Mississippi River above the Falls of St. An-

thony, amounting to about thirty-four acres. Mr. Justice

Field, for the court, used the following language:

"All that was required to form a boom a mile in length and one-eighth of a mile in width was to connect the islands with each other, and the lower end of the island farthest down the river with the west bank; and this connection could be readily made by boom sticks and piers. The land on these islands owned by the defendant in error the company sought to condemn for its uses; * *
* * The jury found a general verdict assessing the value of the land at \$9,358.33, but accompanied it with a special verdict assessing its value aside from any consideration of its value for boom purposes at \$300, and, in view of its adaptability for those purposes, a further and additional value of \$9,058.33. The company moved for a new trial, and the court granted the motion, unless the owner would elect to reduce the verdict to \$5,500. The owner made this election, and judgment was thereupon entered in his favor for the reduced amount. To review this judgment the company has brought the case here on a writ of error. * * * In determining the value of land appropriated for public purposes, the same



considerations are to be regarded as in a sale of property between private parties. The inquiry in such cases must be what is the property worth in the market, viewed not merely with reference to the uses to which it is at the time applied, but with reference to the uses to which it is plainly adapted; that is to say, what is it worth from its availability for valuable uses. Property is not to be deemed worthless because the owner allows it to go to waste, or to be regarded as valueless because he is unable to put it to any use. Others may be able to use it, and make it subserve the necessities or conveniences of life. Its capability of being made thus available gives it a market value which can be readily estimated. * * *

These views dispose of the principle upon which the several exceptions by the plaintiff in error to the rulings of the court below in giving and in refusing instructions to the jury were taken, and we do not deem it important, therefore, to comment upon them." Judgment affirmed.

The application of these principles to the question now under consideration establishes, beyond the possibility of question, the fact that a private owner holding these lands would, if these rights of way were taken from him by condemnation for power purposes, be entitled to compensation not merely for the value of the area taken for general purposes, but for its value for power purposes and that value is in part dependent upon the fall.

It may be true that a local jury, tempted by the desire for power development in their neighborhood, might fix the value of such lands for power purposes at a nominal sum. This has been the common experience in dealing with public utilities in their early stages before their importance and the rights of the public with respect to them were understood. The results of that experience should prevent the passage of S. Bill 6626 (Mr. Teller) "Providing for the condemnation for any public purpose of lands owned or held by the United States" or of any amendment to this bill designed for the same purpose.

The history of Congressional legislation granting or permitting rights of way over the public lands for the use of water clearly shows two things: (1) That such rights of way can not be acquired against the United States by condemnation under State laws, but are reserved to the United States, subject to be acquired only as specified in the acts of Congress and not otherwise. While there are some dicta in early cases to the effect that the unreserved public lands are subject to condemnation under State laws for highways and the like, those cases, nevertheless, recognize that eminent domain can not be exercised under State laws against public lands expressly reserved by the United States. National Forests are so reserved, and, moreover, the Congressional right-of-way statutes operate as a reservation of all public lands for the purposes of the rights of way specified in the several acts. Whatever rights the States may have to take public lands for highways or other public uses undoubtedly rest upon the acquiescence of the United States.

The Congressional legislation above referred to also shows (2) that the Congressional recognition of the right to appropriate water under local laws was not intended to carry with it the right to occupy the public lands for the use of such water, except in the manner and subject to the limitations set forth in such Congressional legislation. A brief reference to three of these right-of-way statutes will show this.

The Act of July 26, 1866, Section 9, (14 Stat. 251) as now embodied in Section 2339 of the Revised Statutes provides as follows:

"That whenever, by priority of possession, rights to the use of water for mining, agricultural, manufacturing, or other purposes have vested and accrued, and the same are recognized and acknowledged by the local customs, laws, and the decisions of courts, the possessors and owners of such vested rights shall be maintained and protected in the same; and the right of way for the construction of ditches and canals, for the purposes aforesaid, is hereby acknowledged and confirmed."

Here are separate grants of the right to use the water and the right to occupy the land.

The Act of March 3, 1891 (26 Stat. 1101-1102), makes a grant of a right of way for irrigation purposes and prescribes a procedure by which such rights of way can be acquired through the Interior Department. Here the right to occupy the public lands for this purpose is treated as entirely separate and distinct from the right to the water and is restricted by several new statutory limitations and provisions.

The Act of February 15, 1901, (31 Stat. 790) authorizes the issue of permits for rights of way for miscellaneous purposes involving the use of water, including the generation and distribution of electrical power. This statute expressly provides that any permit may be revoked by the Department which granted it and shall not confer any right or easement or interest in, to, or over any lands of the United States. Here are

new and stringent limitations imposed upon the occupancy of public lands for these purposes. Such occupancy is treated as a matter entirely distinct from the right to appropriate the water.

It is perfectly clear that Congress deliberately has separated the appropriation of water and the right to occupy public lands in order to use water which has been appropriated. Such rights of occupancy can be acquired only directly from the Federal Government through its own executive agents and only in accordance with the provisions and subject to the express restrictions established by Congress.

D. This Policy of the Forcast Service is Clearly Just

It would be manifestly unjust to require payment for other use of National Forest lands and allow this use without charge, or with a nominal charge which has no relation to the benefits received. Those who want National Forest timber for commercial purposes are required by law to pay for it at a price fixed by competitive bids (Act June 4, 1897, 30 Stat., 35, Use Book, p. 171). The grazers of stock in National Forests are required to pay a reasonable charge, and so are all persons and corporations who use the land or resources of the Forests for commercial profit. Many of those who are required to pay for permits are persons of small means. Commercial power companies are usually great corporations with ample resources. It is not a defensible proposition that wealthy corporations should get privileges of immense commercial value free, while others who receive the benefits of the National Forests are required to pay for them.

E. This Policy of the Forest Service is Shown by Experience
to be Conservative and Practical

The best answer to the accusation that the imposition of the conservation charge has stopped power development in the west is a recital of the permits imposing this charge which have been taken out. A list of these permits arranged by States is annexed. (Exhibit 6). There is also annexed a copy of the letter of C. K. McHarg (Exhibit 7), dated Pueblo, Colo., June 3, 1907, enclosing a copy of a resolution by the Arkansas Valley Ditch Association, approving the policy of the Forest Service which exacts a reasonable payment for all special privileges. There is also enclosed a copy of the letter of W. E. Sprott, President of the Chamber of Commerce of Portersville, Cal., approving the conservation charge. (Exhibit 8).

In a conference held in Washington beginning February 27, 1908, between representatives of the Departments of Interior and Agriculture on the one part, and representatives of the more important power companies and of banking houses in New York and Boston, interested in financing power projects in the West, on the other part, it appeared after full discussion that the limitation of permits to a fifty-year term was not seriously objected to by the bankers and would not put any serious obstacle in the way of financing such projects, since bankers who raise capital for projects of this kind make such arrangements in any event that the bonds will mature and be redeemed before the expiration of the fifty years.

F. The Rate of the Conservation Charge is Reasonable and Just

The preliminary acreage and mileage charge is insignificant in amount, but, as explained above at page 14, it operates to discourage the holding of power sites undeveloped. The conservation charge is not payable until the actual development of power begins and is measured by the actual quantity of power developed in each year. It is based upon the number of kilowatt hours actually generated and recorded by meter. A kilowatt is about one and one-third horsepower, and a kilowatt hour is the amount of electricity that would do the work of one and one-third horsepower for one hour. The rate of charge is low, beginning at ten cents per thousand kilowatt hours for the first five years, with a reduction for small plants to two, four, six, eight, and ten cents for the first, second, third, fourth, and fifty years respectively, and increasing at the end of each subsequent five-year period by an increment not to exceed two and one-half cents, so that in the period from the thirty-sixth to the fortieth year inclusive the highest possible charge in any case would be twenty-seven and one-half cents per thousand kilowatt hours. At the end of forty years there is to be a readjustment of charges according to conditions then existing. It should always be remembered that the rates of charge named in the permit are the maxima. Reductions from

the maxima are made by the Forest Service on the following principles: Since the two advantages furnished by the Government are the maintenance of a steady flow from the forested watershed, and the fall resulting from the topography of the forest, one-half of the conservation charge is calculated as based upon each of these advantages. Therefore: (a) If a part of the watershed which supplies the power plant is outside of the National Forest, the one-half of the conservation charge calculated upon the advantage resulting from the maintenance of a steady flow by the conservation of the forest cover is reduced proportionately; and (b) If a part of the fall which the permittee is to use in developing power is outside of the National Forest, the one-half of the charge which is based upon the fall is reduced proportionately. It is intended to make further reduction where the permittee by the building and maintenance of storage reservoirs increases the average annual flow of the stream, but the precise method by which this reduction is to be measured has not been definitely determined. A copy of the form of conservation permit now in use is annexed. (Exhibit 10).

The reasonableness of the charge is further shown by the following facts:

At the recent conference above mentioned between representatives of the Government and the power companies, when the latter protested that the rate of charge was prohibitive

and confiscatory, the representatives of the Government made the following offer: That the power companies should submit their business to the investigation of the Bureau of Corporations for determination of the question whether or not the rate of charge was unreasonable. No response has ever been made to this suggestion.

One of the most active protestants is the Edison Electric Company, which enjoys a special permit granted by the Act of May 1, 1906, (34 Stat. 163, Use Book, p. 186-189). Section 9 of that act provides that the Company shall pay annually for the privileges granted by the act such reasonable sum as the Secretary of Agriculture may fix from year to year. For the last and the current fiscal years the Secretary of Agriculture fixed a charge to be paid by this Company at the same rate as if the Company had taken permits embodying the conservation charge in the usual form. It should be noted that the statute requires that the annual rental to be fixed by the Secretary of Agriculture shall be a "reasonable sum." If it is in fact confiscatory, the Secretary has exceeded his power, and the Company is not obliged to pay. The courts are open to the Edison Company to try this issue, but the Company has not had recourse to them. Instead, it paid the charge so fixed for those two years. It is not to be supposed that the Company would have done so if the charge was in fact unreasonable.

The Canadian Government is imposing a charge fully as heavy, and probably heavier, for privileges of this character. Early permits at Niagara Falls were for a twenty year term. The present permits are described by the letter of Mr. W. E. Herring, Chief of the Office of Engineering in the Forest Service, to the Forester, dated September 18, 1907, (copy annexed, Exhibit 11). The Company was given a franchise for fifty years, for which it was to pay fifteen thousand dollars per annum,

"and in addition thereto payment at the rate of the sum of one dollar per annum for each electrical horsepower generated, and used and sold or disposed of over 10,000 electrical horsepower up to 20,000 electrical horsepower and the further payment of the sum of seventy-five cents for each electrical horsepower generated and used, and sold or disposed of over 20,000 electrical horsepower up to 30,000 electrical horsepower, and the further payment of the sum of fifty cents for each electrical horsepower generated and used and sold or disposed of over 30,000 electrical horsepower: "...." and within ten days after said first days of November and May in each year, on which such additional rentals shall be payable respectively, the treasurer or if no treasurer, the head office of the company shall deliver to the Commissioners a verified statement of the electrical horsepower generated and used, and sold or disposed of during the preceding half-year and the books of the company shall be open to inspection and examination by the Commissioners or their agent for the purpose of verifying or testing the correctness of such statement, and if any question or dispute arises in respect to such returns, or if any statement delivered at any time by the company to the Commissioners of the quantity of the amount of the electrical horsepower generated and used, and sold, or disposed of or of the amount payable for such additional rentals, the High Court of Justice of Ontario shall have jurisdiction to hear and determine the same, and to enforce the giving of the information required."....." After the first day of May, 1949, the same rentals as are hereby reserved shall continue to be paid by the said company unless the

Lieutenant-Governor-in-Council shall desire a readjustment of the said rent, in which case the rentals for a further period of twenty years shall be readjusted by agreement and in the absence or failure of agreement by the parties hereto then the rentals for such further term shall be ascertained by three arbitrators, or a majority of them, one of them shall be named and appointed etc."

"The Commissioners undertake and agree that the amount of the rentals which may be fixed and charged for the right to use the waters of Niagara and Welland rivers within the park for the purpose of generating electricity by any other company or person shall not be at less rentals than is provided and reserved by these presents. ... "Provided, however, that notwithstanding anything in this paragraph contained, the rentals so to be fixed and charged against any other company or person may be reduced by the rentals provided and reserved by these presents so far only as such reduction may fairly and reasonably be allowed in respect of the increased cost of construction of the canal or of canal and tunnel within the park, by reason of its greater length or other ground of expense in its or their construction, whether required for supply or waste," "such reduction not to be an amount sufficient to give any undue advantage as against the parties of the second part except by reason of such increased cost of canal or tunnel or both, as the case may be."

That the amount of the conservation charge is insignificant in comparison to the value of these power sites is shown by the statement of one of the engineers of the city of Los Angeles, Cal., Mr. E. F. Scattergood, to Mr. William Mulholland, Chief Engineer, dated December 1, 1906, and entitled "Los Angeles Aqueducts Estimates on Amount of Power Used in Southern California; the Valuation of Hydro-Electric Power; Development of Power in San Francisquito Canyon and Delivery of Same in or near Los Angeles; Distribution of Electrical Energy for Light and Power in the City of Los Angeles, Showing Net Return for the Energy Furnished," (copy

annexed, (Exhibit 12), from which it appears upon a total construction cost, including power plants and entire distribution system, of \$3,419,000, the net returns, after the payment of operating expenses and allowing for interest and depreciation at 12-1/2 per cent, are \$1,116,000, nearly 33 per cent of the cost of the entire plant including distribution system.

G. The Demands of the Power Companies are Unconscionable

The power companies demand that these valuable power sites, which are the property of the people, should be handed over to the companies in perpetuity without compensation to the people or any possibility of control by the people.

Nine bills are pending before this session of Congress which would in one form or another grant this demand of the power companies. They are as follows: Senate Bills Nos. 132 (Heyburn), 435 (Fulton), 2661 (Crane), 4179 (Sutherland), 4060 (Guggenheim), 6626 (Teller); House Bills Nos. 212 (Howell), 3907 (Bonyng), 11356 (Kondell). Copies of these bills except S. 4060 are annexed. (Exhibit 13-19). If enacted they would deprive the Secretary of the Interior and the Secretary of Agriculture of the power, which they have now, to make needful regulations affecting rights of way for power projects. Such a change would be most unwise. Without regulations the rights granted would often conflict with the interests of the Government: Thus the work of the Reclamation Service might be seriously hampered. These bills leave absolutely no discretionary power to control location or insure safe construction work, protection of timber left standing or to require construction within a reasonable time after permit and thus prevent monopoly and speculation in public resources.

In National Forests permits under the Act of 1901 are now granted by the Forester under regulations made by the

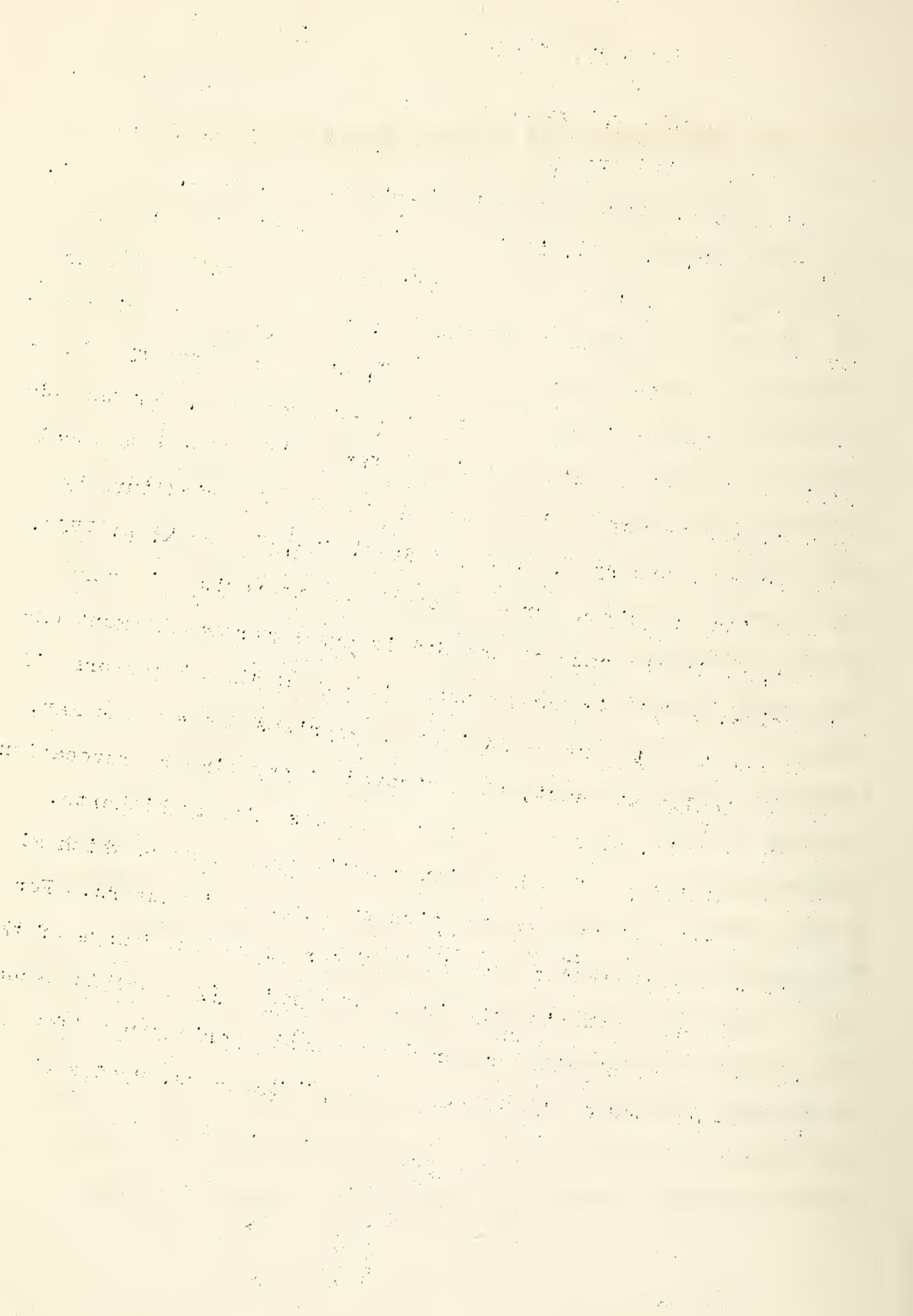
Secretary of Agriculture. Each application is promptly referred to the Supervisor in charge of the Forest affected by it for examination upon the ground and report. Upon receipt of the report permit is prepared in the Washington office, and such conditions are inserted as the peculiar facts of the case may require, and, if the enterprise is a plant for the generation of electric power for sale, a charge for the permit is made one of the conditions of its issue.

The bills cited above are referred to by the President in his Message of April 15, as follows:

"I call your special attention to the attempt of the power corporations, through bills introduced at the present session, to escape from the possibility of Government regulation in the interest of the people. These bills are intended to enable the corporations to take possession in perpetuity of National Forest lands for the purposes of their business, where and as they please, wholly without compensation to the public. Yet the effect of granting such privileges, taken together with the rights already acquired under State laws, would be to give away properties of enormous value."

H. But Irrevocable Permits Should be Allowed

The only grievance which the power companies have is that their permits are revocable at the will of the Secretary of Agriculture. Under the Act of February 15, 1901, (31 Stat. 790, Use Book, p. 185), it is especially provided by the last sentence of the Act that the permittee can get only a license revocable at the pleasure of the Secretary of the Interior when unreserved public lands are affected, and the Secretary of Agriculture when National Forest lands are affected, for the administration of the Statutes in so far as it affects National Forests was transferred to the Department of Agriculture by the Act of February 1, 1905 (33 Stat. 628, Use Book, p. 173). The capital required for many of these enterprises is very large, as in the case of the Stanislaus Power Development enterprise, and it is unreasonable to expect that investors will continue to put large sums into enterprises whose value may, theoretically at least, be destroyed at any time by revocation of the permit, although they have done so freely hitherto. The possibility of such action constitutes a menace which might well be taken into consideration by possible investors. For this reason the Department is in favor of such a change of the law as would authorize the issue of permits irrevocable except for breach of conditions for a reasonable period to be fixed by statute, which should not exceed fifty years, upon such



terms as to payments and other conditions as the circumstances in each case may warrant and as the Department after examination on the ground may prescribe. Such an amendment would remove the one obstacle to steady and full development of the power resources of the National Forests, would leave in the hands of the Government the power to prescribe such conditions as experience might show to be necessary for the protection of the public from monopoly, and would open the way to readjustment of those conditions upon the expiration of the term for which any permit might be granted; it would give investors all the security which they could reasonably ask, and it ought to be adopted instead of any of the pending bills, which, not content making the investors secure, absolutely surrender the public interests to the control of private monopolies.

AMENDMENT

Hereafter permits for the use of National Forest land for the development and transmission of power for sale may be issued upon such terms of payment, tenure and other conditions as the Secretary of Agriculture may by rules and regulations prescribe, but no such tenure shall be for a longer period than fifty years, and any disposal of the land made after due filing of an application upon which any such permit is issued shall in perpetuity be subject to the right of the United States to issue like permits on said land for such purposes and subject to any such permit during the term thereof.



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